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MAR 27 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

In re the Marriage of:	
MIKAL A. SILVERS,	2 CA-CV 2008-0121 DEPARTMENT B
Petitioner/Appellee,	MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure
and	
MIMI SILVERS, nka MIMI DANIEL,	
Respondent/Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20023845

Honorable Richard Henry, Judge Pro Tempore

AFFIRMED

Mimi Daniel — Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Mimi Daniel[1] appeals from the trial court's order modifying a previous parenting-time order. She argues the court abused its discretion by allowing her former husband, appellee Mikal Silvers, out-of-state visitation with their children and by requiring her to pay for half of the transportation costs related to some of these visits. She also argues the court was biased against her and favored Silvers.[2] Silvers has failed to file an answering brief in this appeal, which we may treat as a confession of error as to any debatable issue. *Guethe v. Truscott*, 185 Ariz. 29, 30, 912 P.2d 33, 34 (App. 1995). In our discretion, we decline to do so and address the merits of the issues raised. *See In re Marriage of Diezsi*, 201 Ariz. 524, ¶ 2, 38 P.3d 1189, 1190 (App. 2002) (appellate court has discretion to view party's failure to answer as confession of error). We affirm for the reasons stated below.

Background

¶2 We view the record in the light most favorable to upholding the trial court's decision. *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999). In 2003, the court entered a marital dissolution decree, granting Daniel and Silvers joint custody of their two children, who were then one and ten years old. The parties' "memorandum of understanding," which the trial court incorporated by reference into the decree, set forth the

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[1]We refer to her by her name as restored in the decree of marital dissolution.

[2]We understand Daniel's additional argument—that the court "ignore[d]" its order regarding Silvers's payment of the children's medical and other expenses—to be a request to enforce a prior court order. Yet such requests must first be made in the family law court pursuant to, and in compliance with, Rule 91(A) and (C), Ariz. R. Fam. Law P.

terms of their custody arrangement. This memorandum, however, is not included in the court's files, and the parties have not retained a copy of it. After an examination of the record, the trial court determined that the missing memorandum granted Silvers parenting time with the children but provided he was to have no overnight parenting time with them unless their therapist approved.[3]

¶3 In June 2005, Daniel filed a pro se petition seeking sole custody of the children after Silvers abruptly moved to California. Due to her apparent failure to serve the petition, however, no action was taken on it. Silvers maintained little contact with the children during the next two years.

¶4 In May 2007, he filed a pro se petition to enforce and expand his parenting time. After an evidentiary hearing, the trial court entered provisional parenting-time orders and reserved ruling on other issues raised by the parties. In its supplemental ruling entered in September 2007, the court found that because the parties' circumstances had changed, the original parenting-time agreement "ha[d] no practical binding effect." The court noted there was "no indication from the evidence that the children [were] in counseling or therapy" and found no compelling reason to preclude overnight parenting time. The court then created a parenting-time schedule that granted Silvers overnight parenting time with the children in

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[3]Notwithstanding language in the divorce decree stating the parties would have "joint care, custody and control" over the children, joint physical custody requires a child to reside with both parents. A.R.S. § 25-402(3). Because the children did not stay overnight with Silvers, they did not reside with him; hence, he did not have physical custody of them. *See Owen v. Blackhawk*, 206 Ariz. 418, ¶ 11, 79 P.3d 667, 670 (App. 2003) ("Physical custody involves the child's residential placement, whereas parenting time is what is traditionally thought of as 'visitation.'").

California on the condition that another responsible adult or family member was present. The court further ordered that the parties were required to share equally the travel expenses related to the children's visits with Silvers during their Christmas break from school.

¶5 Before any visit occurred, however, Daniel filed what the court regarded as a motion to reconsider its September ruling. After an evidentiary hearing, the court found "it [had] not adequately balance[d] concerns for the best interests of the children against [Silvers]'s right to have parenting time and [had] made unwarranted assumptions about the wisdom of jumping directly into overnight parenting time for an extended period." The court granted Daniel's motion to reconsider and ordered Silvers to participate in a drug-screening program. The court further ordered that Silvers was entitled to daily parenting time during the 2007-2008 Christmas break roughly as scheduled and contemplated in the previous order.

¶6 In 2008, the trial court held two review hearings and interviewed in chambers the parties' older child, who was then fifteen years old. In its June 2008 ruling modifying the previous order as to parenting time, the court found that Silvers repeatedly had tested negative for drugs and noted that Daniel's fears about the children's safety were not based on any recent events or information. Although Daniel suggested one of the children had been seeing a therapist, the court observed she had not proffered any evidence from a therapist. The court thus found "no evidence from the record of identifiable or tangible harm to the children that would result from frequent and continuing contact with [Silvers] or from a trip to California to have parenting time with him."

¶7 Nevertheless, the trial court expressed concerns regarding Silvers's sporadic contact with the children and lack of initiative in seeing them. The court also expressed concerns that Daniel, who had repeatedly stated in hearings that she wished Silvers would have no parenting time at all, would be uncooperative and overly protective of the children, interfering with their relationship with their father. To address these concerns, the court established a new parenting-time schedule for the children that first required Silvers to have at least three consecutive nights of parenting time with them in Tucson, where they lived, then provided for extended stays with him in California during school holidays and summers. The court affirmed the portion of its prior order related to the parties' sharing travel expenses during the Christmas holiday and further ordered the parties to share equally the travel expenses associated with the children's summer visits. This appeal followed.

Parenting Time

¶8 Daniel argues the trial court abused its discretion in ordering the out-of-state, overnight parenting time, asserting such visits with Silvers are not in the children's best interests. She contends that because the trial judge did not "call[] into court [the] current counselor" and receive testimony from him, the court erred in not "utilizing *all* information and testimony possible" in determining the children's best interests. She also claims the court ignored Silvers's "possible medical problem" that threatened the children's safety. We find no abuse of discretion.

¶9 Section 25-408(A), A.R.S., provides as follows:

> A parent who is not granted custody of the child is entitled to reasonable parenting time rights to ensure that the

> minor child has frequent and continuing contact with the noncustodial parent unless the court finds, after a hearing, that parenting time would endanger seriously the child's physical, mental, moral or emotional health.

A trial court has subject matter jurisdiction over domestic relations matters, *In re Marriage of Dorman*, 198 Ariz. 298, ¶ 7, 9 P.3d 329, 332 (App. 2000), and may modify parenting-time orders "whenever modification would serve the best interest of the child." A.R.S. § 25-411(D). The trial court is in the best position to determine the children's best interests, and we will not disturb its findings in this regard absent a clear abuse of discretion. *Earley v. Earley*, 10 Ariz. App. 308, 309, 458 P.2d 512, 513 (1969).

¶10 Contrary to Daniel's assertion, a trial court is not required to call witnesses *sua sponte* before modifying parenting-time orders. *See generally* Ariz. R. Fam. Law P. 91(F), (N) (specifying procedures for modifying parenting time). Moreover, a psychologist's opinion is merely advisory in a visitation matter, and a trial court is not required to accept uncontradicted testimony from a counselor that visitation would adversely affect a child's mental health. *Sholty v. Sherrill*, 129 Ariz. 458, 461, 632 P.2d 268, 271 (App. 1981).

¶11 Here, the trial court modified its parenting-time orders after it received testimony from both parents and their older child. That testimony reasonably supported its findings that the modifications were in the children's best interests and would not threaten their well-being. As the court noted, the record did not establish that the children currently were experiencing psychological difficulties that required them to see a counselor, nor did the record contain any evidence from the children's purported counselor suggesting the

proposed changes would endanger them. And even if such evidence had been presented, the court was not required to accept it. *See id.*

¶12 Similarly, although the severe, documented mental illness of a parent might justify the denial of parenting time, *see Anonymous v. Anonymous*, 27 Ariz. App. 74, 551 P.2d 64 (1976), Daniel did not establish that Silvers suffers from such a condition or that it would endanger the children. The trial court noted, "The factual predicates for virtually all of the allegations made about [Silvers]" were based on outdated information, and it found "no evidence from the record of identifiable or tangible harm to the children" from greater contact with their father. Daniel essentially acknowledges this evidentiary deficiency in her opening brief, referring to Silvers's alleged disorder as a "possible medical problem" and asking this court to order that Silvers be "seen and diagnosed . . . [by] a licensed Psychologist, [and] be evaluated and prescribed medicines." Yet the trial court was in the best position to weigh the evidence and, because its findings regarding the children's best interests are consistent with the record, we will not disturb its ruling on appeal. *See Earley*, 10 Ariz. App. at 309, 458 P.2d at 513.

Travel Costs

¶13 Daniel further argues the trial court abused its discretion in ordering her to pay half of the travel expenses, because it was Silvers's abrupt move to California that made it necessary for the children to travel, resulting in these expenditures.[4] We review orders

[4]Although Daniel also challenges the order on the ground that Silvers "clearly . . . has a higher income," she has failed to cite to those portions of the record that support this allegation or otherwise develop her argument on this point; we therefore do not address it.

allocating parenting-time travel costs for an abuse of discretion. *See Wood v. Wood*, 76 Ariz. 412, 417-18, 265 P.2d 778, 781-82 (1954); *In re Marriage of Robinson and Thiel*, 201 Ariz. 328, ¶ 19, 35 P.3d 89, 96 (App. 2001).

¶14 When modifying parenting-time orders, courts must consider the Arizona Child Support Guidelines adopted by the Arizona Supreme Court.[5] *See* A.R.S. § 25-320(D); *Robinson*, 201 Ariz. 328, ¶ 19, 34 P.3d at 96. The Guidelines provide that a "court may allocate travel expenses of the child associated with parenting time . . . [and, i]n doing so, . . . shall consider the means of the parents and may consider how their conduct (such as a change of residence) has affected the costs of parenting time." § 25-320 app. § 18. The Guidelines further provide, "To the extent possible, any allocation shall ensure that the child has continued contact with each parent." *Id.* Visitation is in the children's best interests and is not provided solely for the benefit of one parent. *Wood*, 76 Ariz. at 417, 265 P.2d at 782. Thus, a court does not necessarily abuse its discretion by requiring the custodial parent to pay half the travel expenses associated with the children visiting the other parent. *See Robinson*, 201 Ariz. 328, ¶¶ 2, 19, 34 P.3d at 91-92, 96. Whether an allocation of travel expenses is equitable depends on the facts of each case. *Wood*, 76 Ariz. at 418, 265 P.2d at 782.

See Ariz. R. Civ. App. P. 13(a)(6) (appellant's brief must contain "citations to the authorities, statutes and parts of the record relied on"); *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 50, 977 P.2d 807, 815 (App. 1998) (rejecting "assertion . . . wholly without supporting argument or citation of authority").

[5]The Guidelines, which are set forth in A.R.S. § 25-320 app., "are not substantive law, but function rather as a source of guidance to trial courts in applying the substantive statutory and case law." *Little v. Little*, 193 Ariz. 518, ¶ 6, 975 P.2d 108, 111 (1999).

¶15 Here, the court considered both parties' financial resources, noting they were "limited," and it observed that Silvers's "unexplained and sudden move from Arizona to California" had made parenting time more difficult to arrange. Nevertheless, Silvers's move was simply one factor for the trial court to consider when apportioning travel costs. That move did not necessarily require Silvers to bear these costs alone. *See* § 25-320 app. § 18. Indeed, the record also establishes Daniel had ties to California and took trips there herself. Hence, in seeking to ensure the children could spend time with their father, we cannot say the court abused its discretion by requiring Silvers to pay the majority of the children's travel expenses but ordering Daniel to share equally the cost of some of the children's visits to California.

Bias

¶16 Daniel argues the trial court "displayed a pattern of bias" against her but admits she is "not sure how that is handled." She adds, "I would certainly appreciate a different Judge in [the] future." Daniel did not file a motion for a change of judge for cause below, pursuant to A.R.S. § 12-409, and Rule 42(f)(2), Ariz. R. Civ. P. And, although she invites this court to "closely scrutinize[]" the trial court's "previous ruling . . . [and] past history" to uncover the alleged bias, we decline to do so.

¶17 Daniel has failed to adequately argue and support this claim on appeal. It is not incumbent on this court to develop a party's argument. *See Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143, 750 P.2d 898, 901 (App. 1987). "Parties who choose to represent themselves 'are entitled to no more consideration than if they had been represented by

counsel' and are held to the same standards as attorneys with respect to 'familiarity with required procedures and . . . notice of statutes and local rules.'" *In re Marriage of Williams*, ___ Ariz. ___, ¶ 13, 200 P.3d 1043, 1046 (App. 2008), *quoting Smith v. Rabb*, 95 Ariz. 49, 53, 386 P.2d 649, 652 (1963) (omission in *Williams*). Opening briefs must provide authority and citations to the record supporting each argument asserted, Ariz. R. Civ. App. P. 13(a)(6), and the failure to do so will result in a waiver. *State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App. 1990). Because Daniel has failed to develop this argument in her brief, she has waived it on appeal.

¶18 However, we would reject Daniel's argument even if it were not waived by her failure to present it adequately. A presumption exists that a trial judge is free of prejudice and bias. *State v. Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d 756, 768 (App. 2005). A party challenging a trial judge's impartiality must overcome this presumption and "prov[e] 'a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants.'" *State v. Cropper*, 205 Ariz. 181, ¶ 22, 68 P.3d 407, 411 (2003), *quoting In re Guardianship of Styer*, 24 Ariz. App. 148, 151, 536 P.2d 717, 720 (1975). "'[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *State v. Henry*, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555 (1994) (alteration in *Henry*).

¶19 As mentioned previously, the trial court granted Daniel's motion to reconsider; it ordered Silvers to participate in a drug-screening program, as she had requested; and its ultimate ruling, which was legitimately critical of both Silvers and Daniel, accommodated her wish that Silvers spend "time . . . in [the] children's environment." Thus, no bias in favor of Silvers or against Daniel appears from the record.

Conclusion

¶20 For the foregoing reasons, we affirm the trial court's orders modifying parenting time and allocating travel costs associated with the children's out-of-state visits.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge